IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

PETITION FOR REHEARING

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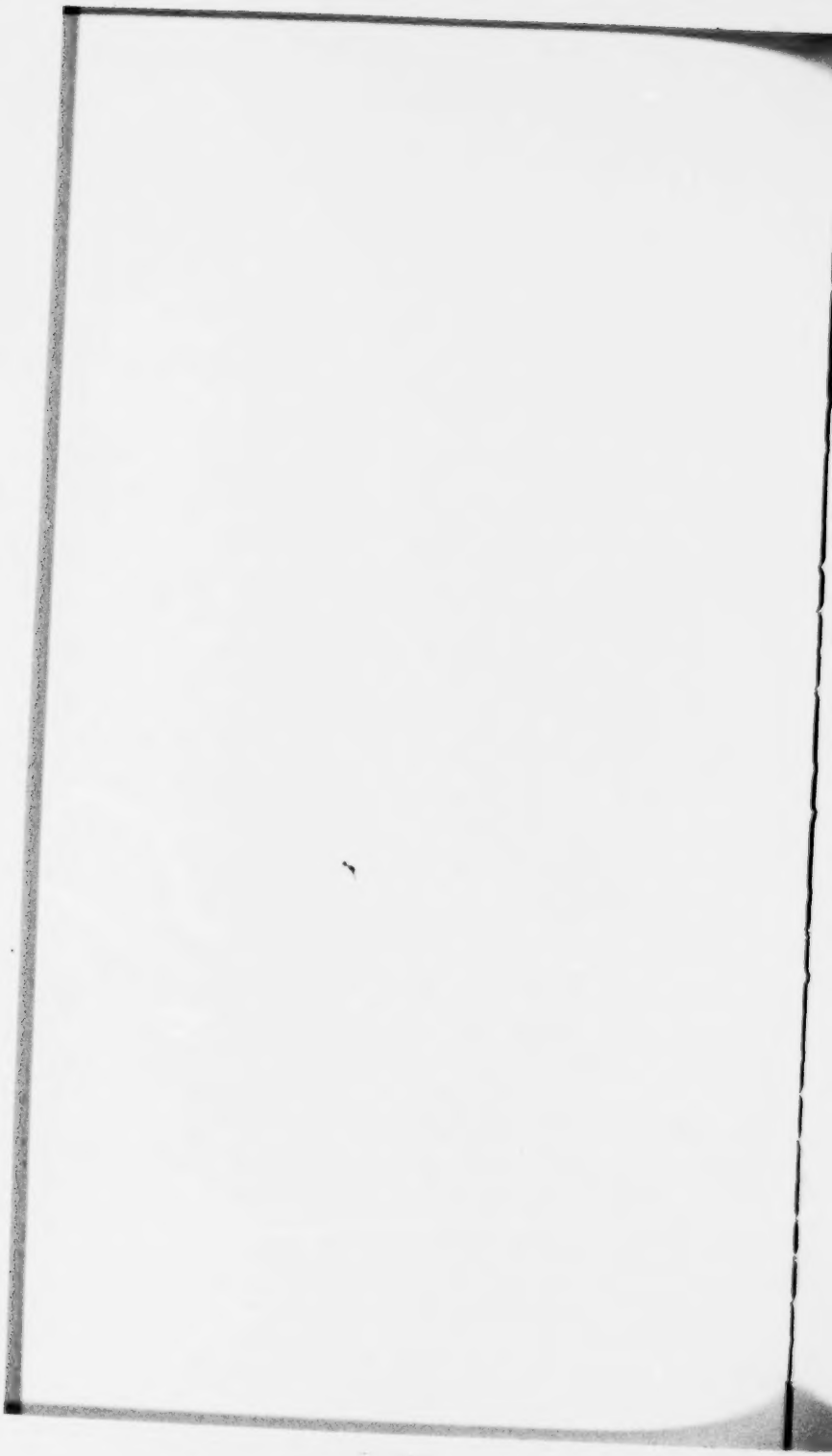

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Petitioner, State of Maryland, prays that this Court grant a rehearing of its judgment of April 5, 1954, reversing and remanding the judgment of the Court of Appeals of Maryland.

REASONS FOR GRANTING REHEARING

(1) The majority opinion of April 5, 1954, reaches the conclusion that Maryland's attempt to require Miller Brothers Company to act as its use tax collector was an appropriation of jurisdiction over matters over which the State of Delaware, rather than Maryland, has authority

and "that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax". The opinion suggests, and logically requires, the conclusion that Delaware would have jurisdiction to require use or sales tax collection by Miller Brothers Company with regard to the transactions about which this case is concerned. *In fact, with regard to the bulk of such transactions, namely, those where delivery of the goods sold took place in Maryland, no such jurisdiction in Delaware can exist.* That State manifestly could not tax use of the goods since use would occur only in Maryland. Similarly, since a sale of goods in one State for delivery in another is interstate commerce, a Delaware tax upon the sale would be bad. See *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292; *McLeod v. Dilworth Company*, 322 U. S. 327. Compare Rutledge (J.) concurring in *General Trading Company v. State Tax Commission of Iowa*, 322 U. S. 335, and dissenting in *McLeod v. Dilworth Company*, 322 U. S. 327, at 322 U. S., page 361.

Thus, as to the bulk of the transactions here involved, there was no invasion by Maryland of a jurisdiction of Delaware, for Delaware could have levied neither a sales nor a use tax with regard to those transactions, and, therefore, could have required no tax collection by Miller Brothers Company.

(2) It does not perhaps, of necessity, follow that, because Delaware had no jurisdiction in the matter, Maryland must have jurisdiction. Nevertheless, they are the only two States concerned. Where it can be shown that one of two possible States can have no jurisdiction in the matter, exercise of jurisdiction by the other manifestly is less likely to result in unjust consequences violating basic principles of fairness embodied in the due process clause.

This Court has demonstrated, in a closely analogous situation, that the impracticality or impossibility of supervision of a transaction by a State whose contacts with the actor are the most substantial will be an operative consideration in permitting a State, possessing little contact with the actor but primarily concerned with the impact of its actions, to exercise jurisdiction in the matter. *Travelers Health Association v. Virginia,* 339 U. S. 643.

(3) Since Delaware, despite its many contacts with Miller Brothers Company, has no jurisdiction to require sales or use tax collection by it with regard to the transactions here involved, the Court is presented with the alternatives of (1) allowing Maryland to exercise the jurisdiction, or (2) of saying that no State shall exercise it. If the present judgment of this Honorable Court stands, it means the latter alternative has been chosen. Its consequences, where both States involved have sales and use taxes, would be incongruous enough to raise substantial doubt that they should properly be ascribed to the due process clause. The situation to which we refer presently exists in Maryland and the District of Columbia. Both have sales taxes and compensating use taxes. If neither can require vendors located in the other who make sales to its residents, completed by delivery, to collect use taxes, it means that Maryland buyers will flock to the District of Columbia department stores while the District consuming public will concentrate its buying in Silver Spring and other commercial areas of Maryland. Admittedly, collection of sales and use taxes is efficient only when performed by the vendor. Therefore, the situation will exist where, *not for commerce clause reasons* but solely on due process grounds, many transactions will be altogether exempt from the requirement of tax collection by the vendor, and, hence, as a prac-

tical matter, from tax, although both of the two jurisdictions concerned would wish the requirement to extend to all transactions. A jurisdictional vacuum of this nature is hardly a consummation devoutly to be wished.

(4) To state our position somewhat differently, we feel the opinion of the Court errs in ascribing lack of jurisdiction by Maryland to the fact that the sales involved were entirely Delaware sales. Where a sale involves delivery from one State to another, it traditionally has been deemed interstate. It is impossible to say, without a complete contradiction in terms, that all contacts with an *interstate* sale are had by *only one* of the two States. Thus, either Maryland has substantial contacts with the sale justifying its jurisdiction to impose so intimately related a duty as that of tax collection, or else hereafter sales involving delivery from one State to another are to be regarded as local not interstate. In that event, the State of origin will be justified in levying a sales tax against the transaction. This consequence of the Court's opinion in the present case will be so radical a departure from the generally accepted and applied principles of sales and use tax law that we respectfully submit reargument should be permitted, particularly since such a possible consequence was in no way conceived of or alluded to in the briefs and oral arguments presented to this Honorable Court by the parties.

(5) Finally, the opinion of April 5, 1954, distinguishes "the nearest support for Maryland's position", *General Trading Co. v. State Tax Commission*, 322 U. S. 335, on the grounds that the state of destination there had much more substantial contacts, "the only nonlocal phase of the total sale being acceptance of the order". Yet, the *General Trading Co.* case presented a transaction altogether identical

with that concerned in its companion case, *McLeod v. Dilworth Co.*, 322 U. S. 327, where the Court determined that the transaction was completed in the state of origin, saying at page 330:

> "* * * the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale — the transfer of ownership — was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries. * * *"

We submit that such contemporaneous characterization of the factual situation in the *General Trading Co.* case is more pertinent to the determination of the quantum of contact deemed necessary by the Court for the state of destination to impose the use tax collecting duty, than the contrary characterization presently ascribed to it by this Honorable Court.

CONCLUSION

For the reasons set forth above, it is respectfully urged that rehearing be granted.

Respectfully submitted,

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I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

FRANCIS D. MURNAGHAN, JR.,
Asst. Attorney General,
Of Counsel for Petitioner,
State of Maryland.